FILE COPY

FILED
APR 3 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 872

FORD MOTOR COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

No. 873

THE QUAKER OATS COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR REHEARING ON MOTION TO DISMISS OR AFFIRM

W. A. Seifert,
Geo. Ross Hull,
Roy J. Keefer,
Counsel for Appellants.

INDEX

Table of Contents

	Page
Orders of the Court	1
Basis of Request for Rehearing	2
The Nature of the Tax	3
The Reasonableness of the Method of Allocation and the Taxation of Property Outside the State	7
The Equal Protection of the Laws	7
Impairment of the Obligation of Contract	12
Interstate Commerce	15
Conclusion	17
Certificate of Counsel	18

Table of Cases Cited

Airway Corp. v. *Day*, 266 U. S. 71	10
Aluminum Co. of America v. *Evatt*, 140 Oh. St. 385, 45 N. E. (2d) 118	17
American Smelting & Refining Co. v. *Colorado*, 204 U. S. 103	12
Arrott's Estate, 322 Pa. 367, 185 Atl. 697	6
Bass, Ratcliff & Gretton v. *Tax Commission*, 266 U. S. 271, 280	3
Butler Bros. v. *McColgan*, 315 U. S. 501	7
Commonwealth v. *Columbia Gas & Electric Corp.*, 336 Pa. 209, 8 A (2d) 404	6
Commonwealth v. *Ford Motor Company*, 350 Pa. 236 38 A (2d) 329	6

PAGE

Commonwealth v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169, 41 Atl. 594 7

Commonwealth v. *The Quaker Oats Company*, 350 Pa. 253, 38 A (2d) 325 6

Commonwealth v. *The Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A (2d) 15 6

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77 14

Cream of Wheat Co. v. *Grand Forks*, 253 U. S. 325 . 11

Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450 16

Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341, 356, 357, 358 6

Educational Films Corp'n v. *Ward*, 282 U. S. 379 .. 3, 8

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 165 ..... 3, 8

Ford Motor Company v. *Beauchamp*, 308 U. S. 331 .. 7

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494. 8, 11

Higginbotham v. *Baton Rouge*, 300 U. S. 535, rehearing denied in 307 U. S. 649 14

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290 . 17

Irving Trust Co. v. *Day*, 314 U. S. 556 14

Kansas City, Ft. S. & M. Co. v. *Kansas*, 240 U. S. 227. 10

Kansas City, Memphis & Birmingham R. R. Co. v. *Stiles*, 242 U. S. 111 ..... 9, 10

Matson Navigation Co. v. *State Board*, 297 U. S. 441 . 17

Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313 .. 11

Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 247 U. S. 132 ..... 9, 10

Phelps v. *Board of Education*, 300 U. S. 319, 322-3 ...13, 14

PAGE

Roberts & Scheafer Co. v. *Emmerson*, 271 U. S. 50 ... 10

Society for Savings v. *Coite*, 73 U. S. (6 Wall.) 590 .. 7

Southern Railway Co. v. *Greene*, 216 U. S. 400 ..... 8, 11

State Highway Route No. 72, 265 Pa. 369, 108 Atl. 820 5

United States Express Co. v. *Minnesota*, 223 U. S. 335 16

Western Live Stock v. *Bureau*, 303 U. S. 250, 256..15, 16, 17

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1 10

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193 11

TABLE OF STATUTES CITED

Act of May 16, 1935, P. L. 184, 72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a-1892d. This Act is referred to elsewhere herein as the Act of 1935 3

Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n 4

Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, sections 2852-1010 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 872

FORD MOTOR COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

No. 873

THE QUAKER OATS COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR REHEARING ON MOTION TO DISMISS OR AFFIRM

On March 12, 1945, this Court handed down the following order in No. 872:

"Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Flint v. Stone Tracy Co., 220 U. S.

107, 165; Educational Films Corp'n. v. Ward, 282 U. S. 379; Ford Motor Co. v. Beauchamp, 308 U. S. 331; Butler Bros. v. McColgan, 315 U. S. 501; (2) Kansas City, Memphis & Birmingham R. R. v. Stiles, 242 U. S. 111; Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132; (3) Phelps v. Board of Education, 300 U. S. 319, 322-3."

On March 12, 1945, this Court handed down the following order in No. 873:

> "Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Flint v. Stone Tracy Co., 220 U. S. 107, 165; Educational Films Corp'n. v. Ward, 282 U. S. 379; Ford Motor Co. v. Beauchamp, 308 U. S. 331; Butler Bros. v. McColgan, 315 U. S. 501; (2) Kansas City, Memphis & Birmingham R. R. v. Stiles, 242 U. S. 111; Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132; (3) Phelps v. Board of Education, 300 U. S. 319, 322-3; (4) Western Live Stock v. Bureau, 303 U. S. 250, 256, and cases cited."

Basis of Request for Rehearing

Appellants respectfully request this Court to reconsider its orders dismissing the above appeals for want of a substantial federal question. The basis of this request is that the cases relied upon by it are not decisive of the issues raised in the appeals. There are a number of differences between those cases and the instant cases which warrant this Court in taking or noting jurisdiction of the present appeals in order to decide the merits of the issues raised therein.

These differences and the application of the cases relied upon by this Court to the issues raised in the appeals will now be discussed.

The Nature of the Tax

Appellants contended that the Act of May 16, 1935, P. L. 184, (72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a-1892d) imposed a tax on the property of foreign corporations, and that in the settlements of tax against appellants their property outside of Pennsylvania was taxed. The Supreme Court of Pennsylvania held that the tax was imposed on the franchise for the privilege of doing business in Pennsylvania. *Appellee in its Motion to Dismiss or Affirm did not contend that this issue had been decided by this Court or that it did not present a substantial federal question.*

In dismissing this issue, this Court cited *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165, and *Educational Films Corp'n.* v. *Ward*, 282 U. S. 379. In both these cases this Court took jurisdiction in order to determine the nature of the tax and announced the well settled principle that it is not bound by the characterization given a tax by lower courts and the lawmaking power or relieved from the duty of considering the real nature of the tax from its operations and incidents.

Therefore, these cases are directly applicable to, and are decisive of, the issue as to the nature of the tax in the instant cases *only if there are no substantial differences between those cases and the instant cases*—but it is submitted that these cases are not controlling in the instant cases because of the following substantial differences:

In the *Flint* case, an Act of Congress was involved. In the *Ward* case, the statute at issue was an amendment to a prior statute of the State of New York which had previously been construed by this Court in *Bass, Ratcliff & Gretton* v. *Tax Commission*, 266 U. S. 271, 280, in accordance with the interpretation thereof by the Federal Court and the state

courts. In both cases, the tax was based upon or measured by net income, and *the statute involved contained an express legislative declaration as to the character of the tax.*

The Act of Congress imposed tax on every corporation, joint stock company, or association or insurance company,

> "with respect to the carrying on or doing business by such corporation * * *."

The New York amending statute imposed tax on every domestic corporation of certain classes,

> "for the privilege of exercising its franchise in this state in a corporate or organized capacity."

In the instant cases:

(a) The statute does not contain any express legislative declaration as to the character of the tax or any change in the subject matter of the tax. It is not stated anywhere *in the body of the statute* that the subject matter of the tax is the franchise granted to foreign corporations for the privilege of doing business in Pennsylvania. The tax is imposed on "the taxable value" which is the part of the whole actual cash value of the capital stock allocated to Pennsylvania. The legislature knew how to express such a legislative intent because in another statute enacted on the same date, to wit, the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, (72 Purdon's Statutes, sections 3420a-3420n), it provided in Section 3 as follows:

> "Every corporation shall be subject to, and shall pay *for the privilege of doing business in this Commonwealth,* a state excise tax at the rate of six per centum upon each dollar of net income of such corporation." (Italics ours.)

The only reference in the Pennsylvania statute to a franchise tax is in the *title* thereof (not in the statute itself)

where it is stated that there is being substituted "a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations."

In the instant cases, therefore, the title of the statute contains a reference to a franchise tax on foreign corporations but the body of the statute makes no reference to the proposed change, and does not, in terms, impose the tax on any franchise of foreign corporations. Under these circumstances, the Supreme Court of Pennsylvania held, in the case of *State Highway Route No. 72*, 265 Pa. 369, 108 A. 820, *that the title of a statute "cannot give validity to a subject omitted from the body of an Act."* In that case, the court said at page 374:

> "The title of the Act of 1911 (P. L. 468), includes, inter alia, a clause, 'providing for the payment of damages in taking of property, or otherwise, in the improvement thereof (of highways).' And appellants earnestly contend that the use of the words, 'or otherwise' in the title shows an intent to impose upon the Commonwealth liability for all damages resulting from improvement of State highways, including change of grade, and that the act should be so construed. Such contention cannot be accepted. The liability is imposed by the enacting clause, not by the title; while the latter is regarded as a part of the statute and may properly be considered in its construction (Halderman's App., 104 Pa. 251, 259; Eby's App., 70 Pa. 311, 314; Pennsylvania R. R. Co. v. Riblet, 66 Pa. 164; Yeager v. Weaver, 64 Pa. 425, 428; Brink v. Marsh, 53 Pa. Superior Ct. 293); yet the title cannot give vitality to a subject omitted from the body of the act; for while a statute cannot be broader than its title, the title may be broader than the statute; if so, the latter must control."

(b) In Section 21(c) of the statute, it is provided that *domestic and foreign corporations* liable to tax under Section 21(b),

> "shall not be required to pay any *further* tax on the mortgages, bonds, and other securities owned by them * * *." (Italics ours.)

This language is indicative of a property tax.

(c) The opinions of the Supreme Court of Pennsylvania are inconsistent on the question as to the nature of the tax imposed on foreign corporations under the Pennsylvania statute. In the instant cases, 350 Pa. 253, 38 A. (2d) 325, *(The Quaker Oats Co.)*, 350 Pa. 236, 38 A. (2d) 329 *(Ford Motor Company)*, and in *Commonwealth* v. *Columbia Gas & Electric Corporation*, 336 Pa. 209, 8 A. (2d) 404, it held that the tax was on the franchise for the privilege of doing business; but in *Arrott's Estate*, 322 Pa. 367, 185 Atl. 697, and in *Commonwealth* v. *The Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A. (2d) 15, it held that the tax was in effect a property tax.

(d) The Pennsylvania statute at issue amended a prior statute which imposed a tax on the capital stock of both domestic and foreign corporations, and which had been construed by this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 356, 357, 358, as imposing a property tax. Under the amending statute of 1935, "the actual cash value of capital stock" continued to be the basis of the tax for both classes of corporations. The tax on domestic corporations remained unchanged and the only change made in the taxation of foreign corporations was in the method of allocation of their capital stock value.

(e) Under the statute, the basis of the tax, to wit, "the actual cash value of the whole capital stock," is determined

by an appraisal and valuation of all property and assets including bonds, mortgages, moneys at interest, franchises, privileges and good will. See *Commonwealth* v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169. This is indicative of a property tax. See *Society For Savings* v. *Coite*, 73 U. S. (6 Wall.) 590.

Wherefore, by reason of these substantial differences between the two cases cited by this Court and the instant cases, it is submitted that this Court should take or note jurisdiction of the present appeals in order to determine the issue as to the nature of the tax.

The Reasonableness of the Method of Allocation and the Taxation of Property Outside the State

In their Briefs in Reply to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellants discuss these two issues and distinguish the cases of *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, and *Butler Bros.* v. *McColgan*, 315 U. S. 501, relied upon by this Court in dismissing the appeals in so far as these issues are concerned. (Ford Motor Company, pages 16 to 34; The Quaker Oats Company, pages 15 to 33.)

For the reasons given and the distinctions made there, appellants respectfully submit that this Court should take or note jurisdiction of the two appeals in order to determine these issues on the merits.

The Equal Protection of the Laws

Appellants own United States securities and shares of subsidiary corporations. Prior to 1935, such investments when owned by either domestic or foreign corporations were not taxed. Under the Act of 1935 as construed, these investments were included in the computation of the tax on

appellants and increased the tax of each appellant by $18,972.94 (Ford Motor Company) and $4,537.61 (The Quaker Oats Company) but such investments were exempted from tax when owned by domestic corporations of the same kind. Although the tax rate on domestic and foreign corporations under the Act of 1935 is the same, the tax rate on domestic corporations is actually lower because of the allowance of exemptions which are denied to foreign corporations. Thus a greater tax burden on comparable capital is imposed on foreign than on domestic corporations. Appellants contend that this difference in treatment between them and domestic corporations of the same kind denies to them the equal protection of the laws on the authority of the cases of *Southern Railway Co.* v. *Greene*, 216 U. S. 400, and *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

Appellants concede that under a statute imposing a tax on the franchise for the privilege of doing business, there may be included in the computation of the tax non-taxable assets such as United States securities or the income therefrom, on the authority of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, and *Educational Films Corporation* v. *Ward*, 282 U. S. 379. However, appellants submit that the Act of 1935 which allows exemptions to domestic corporations that are denied to foreign corporations creates the very essence of discrimination and denies to foreign corporations the equal protection of the laws.

The franchise tax statutes of other states and the decisions of this Court arising thereunder are not applicable or controlling in the instant cases because, under those statutes, the tax on the franchise for the privilege of doing business is imposed on both domestic and foreign corporations and, in the computation of the tax, *exemptions are not allowed to either class.*

This Court, in dismissing the issue of discrimination in the instant cases, cited as controlling the cases of *Kansas City, Memphis & Birmingham R. R.* v. *Stiles,* 242 U. S. 111, and *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132. Appellants submit that this Court erred in dismissing this issue on the authority of these cases, and that they are entitled, as a matter of justice, to have the error corrected.

These cases support the proposition that *a domiciliary state has a greater power to tax its own corporations than it has to tax foreign corporations after having been admitted to do business*—and not the converse proposition which is involved in the instant cases.

In the *Stiles* case, the Alabama statute imposed a franchise tax *upon domestic corporations based upon their whole paid-up capital stock,* and *on foreign corporations doing business in the state based on the actual amount of capital employed in the state.* In the *Northwestern Life Ins. Co.* case, the Wisconsin statute imposed an annual license fee *on domestic insurance companies based on 3% of gross income* and, *on foreign insurance companies of a similar kind, a fixed fee of $300 or such larger amount as may be imposed* under the retaliatory law. In both cases, *the domestic corporation* complained on the ground that it was denied the equal protection of the laws in favor of *foreign corporations.* This Court held not. It said in the *Stiles* case at p. 118:

> "There is no denial of equal protection of the laws (to domestic corporations) because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them." (Words in parentheses ours.)

Similar language is found in the *Northwestern Mutual Life Insurance Co.* case at p. 139.

The error made by this Court, by the Supreme Court of Pennsylvania, and by Appellee was in assuming that this language supported the proposition that a different and greater tax could be imposed under the Act of 1935 on *foreign corporations* than on *domestic corporations.* That this is not so can be readily demonstrated.

The domiciliary state may impose on its own corporate creatures a tax on the primary franchise to be a corporation and, also, a tax on the secondary franchises to do business, but such state, in the case of foreign corporations, may impose a tax only on the privilege granted of exercising the secondary franchises within its borders.

The domiciliary state may impose a franchise tax on domestic corporations based upon *their entire authorized capital stock without apportionment,*

> *Kansas City, Ft. S. & M. Co.* v. *Kansas,* 240 U. S. 227;
> *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles,* 242 U. S. 111

but such a tax imposed on foreign corporations, after having been admitted to do business, violates the due process and commerce clauses of the Federal Constitution,

> *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1

and, also, a franchise tax imposed on foreign corporations based upon *authorized* capital stock in the proportion represented by business transacted and property located in the state violates the due process and commerce clauses of the Federal Constitution,

> *Airway Corp.* v. *Day,* 266 U. S. 71;
> *Roberts & Scheafer Co.* v. *Emmerson,* 271 U. S. 50

The domicilary state may impose a tax upon *all* of the intangibles of a domestic corporation on the basis of presumption of situs at the domicile,

Cream of Wheat Co. v. *Grand Forks,* 253 U. S. 325;
Newark Fire Ins. Co. v. *State Board,* 307 U. S. 313;

but may impose tax only upon such intangibles of a foreign corporation as have acquired a business or commercial situs in the taxing state;

Wheeling Steel Corp. v. *Fox,* 298 U. S. 193.

The above cases prove beyond doubt that a state may impose a different and greater tax burden on domestic than on foreign corporations. That, however, is not the issue in the instant cases. *The question here is whether a greater comparative tax burden may be imposed on the tax base of foreign corporations than is imposed on domestic corporations.* This Court has held that to do so violates the equal protection of the laws in favor of domestic corporations in *Southern Railway Co.* v. *Greene,* 216 U. S. 400, and in *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494.

The situation in the instant cases is no different than that in the *Harding* case. There, under an Illinois statute, a foreign fire insurance company was taxed upon 100% of the full value of its net receipts whereas domestic fire insurance companies were taxed upon only 30% of the full value of personal property, net receipts having been construed as personal property. Here, the tax base of domestic corporations does *not* include investment in United States securities and shares of subsidiary companies but the tax base of appellants, foreign corporations, does include such investments.

Wherefore, it is respectfully submitted that this Court

should reconsider its order dismissing this issue in reliance on the two cases cited by it, and that it should take or note jurisdiction of these appeals in order to decide the issue of discrimination on its merits.

Impairment of the Obligation of Contract

Appellants contended that a contract between them and the Commonwealth, guaranteeing to them equality in matters of taxation with domestic corporations of the same kind, was created by the provisions of Section 1010 of the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852. That section provides:

> "A foreign corporation, which shall have received a Certificate of Authority under this Act, * * *, shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter may be imposed upon domestic corporations * * *."

Appellants further contended that the provisions of this contract were impaired by the Act of 1935 as construed when their investments in United States securities and in shares of subsidiary corporations were included in the computation of the tax on them under the Act of 1935, and their tax thereby increased by $18,972.94 (Ford Motor Company) and $4,537.61 (The Quaker Oats Company), whereas such investments were exempted from tax when owned by domestic corporations of the same kind.

In support of these contentions, appellants cited *American Smelting and Refining Co.* v. *Colorado*, 204 U. S. 103, which held that the language of a Colorado statute similar to that of Section 1010 of the Pennsylvania Business Corporation Law of 1933 created such a contract, and that the contract was impaired by a taxing statute imposing a state license tax on domestic corporations at the rate of *two*

cents upon each $1,000 of their capital stock and on foreign corporations at the rate of *four cents* upon each $1,000 of their capital stock.

This Court dismissed this issue, citing as controlling, its decision in *Phelps* v. *Board of Education*, 300 U. S. 319, 322-3, where it said:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them."

It is submitted that this case should not be considered as controlling on the issue as to impairment of obligation of contract in the instant cases *because the Supreme Court of Pennsylvania assumed here that a contract existed as contended by appellants,* but held that its terms were not violated on the ground that the Act of 1935 imposed an equivalent tax burden on domestic and foreign corporations. See the opinions of that court on this issue which are attached to the Statements as to Jurisdiction (Ford Motor Company, page 50 and The Quaker Oats Company, pages 42 and 60). There the Court said:

> "An equivalent tax burden is imposed on both classes of corporations which is a sufficient compliance with the contract appellant derives from the section of the Business Corporation Law cited."

This conclusion as to the equivalency of the tax burden imposed on domestic and foreign corporations is based

upon the comparison of the amount of capital stock tax appellants *would pay if they were domestic corporations* with the amount of tax imposed on them under the Act of 1935. See opinion of the Court at page 49 of Statement as to Jurisdiction (Ford Motor Company).

Appellants have shown in their Briefs in Reply to Appellee's Motion to Dismiss or Affirm that this comparison does not prove the existence of an equivalent tax burden because it is wholly without foundation in the law *and is based upon an unconstitutional presumption.* (Ford Motor Company, pages 38 and 39; The Quaker Oats Company, pages 37, 38 and 39).

Appellants submit that the *Phelps* case, where the state courts held that the state statute did not create a contract, is not controlling in the instant cases where the Supreme Court of Pennsylvania assumed the existence of a contract under the state statute.

It is the duty of this Court in the present appeals, independently of the state court's opinions, to decide, as federal questions, the existence of any contract and the extent of its obligations;

Higginbotham v. *Baton Rouge,* 306 U. S. 535, rehearing denied in 307 U. S. 649;
Irving Trust Co. v. *Day,* 314 U. S. 556;

or in any event, to take jurisdiction of these appeals in order to review the state court's conclusion that the terms of the contract are not violated—where such conclusion, as contended by appellants, is based upon an *unconstitutional* tax comparison. See *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U. S. 77, 81.

Interstate Commerce

This issue is involved only in the appeal of The Quaker Oats Company, which will be referred to as appellant.

In the computation of tax against appellant, the Supreme Court of Pennsylvania interpreted the Act of 1935 as requiring that intrastate receipts of $171,773 and the *whole* of the interstate receipts of $7,052,574, which arose from orders solicited by appellant's two Pennsylvania sales offices but where the sales were consummated by appellant outside of Pennsylvania, be included in the numerator of the gross receipts allocation fraction.

Appellant contended that under the facts in the instant case, the Act of 1935 as so intrepreted discriminates against and unlawfully burdens interstate commerce because the interstate receipts of $7,052,574, which arose from activities and employment of capital both within and without the state, are not apportioned to the part of the interstate commerce carried on *within* the state.

This Court, in dismissing the appeal, cited as controlling this issue the case of *Western Live Stock* v. *Bureau,* 303 U. S. 250, 256, and cases there cited. Appellant submits that this case is not directly applicable because of the difference in factual situation and, further, that the cases therein cited require an apportionment of appellant's interstate receipts in the amount of $7,052,574.

In the *Western Live Stock* case, appellants published a monthly livestock trade journal which was wholly prepared, edited and published within the State of New Mexico, where their only office and place of business were located. The journal had a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation.

The New Mexico statute levied on all engaged within the

state in the business of publishing newspapers or magazines a privilege tax of 2% on the gross receipts from the sale of advertising. Appellants contended that the tax violated the Commerce Clause. This Court held not, in affirming the State court, because the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not the circulation be interstate commerce. It said at page 260:

> "The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."

The situation is wholly different in the instant case. Sales of $7,052,574, included in the numerator of the gross receipts fraction, were made in interstate commerce. Sales activities carried on, and capital employed, in more than on state produced these sales.

The cases cited in the *Western Live Stock* case at pages 256 and 257, would, under the circumstances, require an apportionment of the interstate sales in the instant case so that only a portion and not the *whole* of the interstate sales receipts could be used in the numerator of the gross receipts fraction.

In the cases of *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, and *United States Express Co.* v. *Minnesota,* 223 U. S. 335, (cited at page 257) where gross receipts were used to measure the value of property employed within the taxing state—which appears to be the theory in the instant cases—the gross receipts were limited to intrastate receipts and to that portion of the interstate receipts which the mileage within the taxing state bore to the total mileage traveled by cars owned by these taxpayers.

In *Matson Navigation Co.* v. *State Board,* 297 U. S. 441, this Court approved the use by California of only 22.2% of interstate receipts. Under the Texas statute, no interstate receipts are used, and this was an important factor in *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 335.

If there is not made a reasonable apportionment of the interstate sales receipts in the instant cases so as to limit the amount to be used in the numerator of the gross receipts fraction to that portion of the interstate commerce within Pennsylvania, then the tax extends as stated by this Court in the *Western Live Stock* case at page 257—

> "to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every state in which the business is conducted."

Unless this apportionment is made, cumulative and multiple taxation of the interstate commerce results because Illinois and Ohio use the same sales in the computation of their franchise taxes imposed on appellant.

> *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290; *Aluminum Co. of America* v. *Evatt,* 140 Ohio St., 385, 45 N. E. (2d) 118.

Conclusion

Because the cases cited by this Court in its orders granting the motion to dismiss and in dismissing the two appeals are not directly applicable to, or controlling of, the issues raised in the appeals, appellants respectfully request this Court to reconsider the Motion to Dismiss or Affirm in each case, and to note jurisdiction of the appeals.

We, the undersigned, certify that the within Petition for Rehearing is presented in good faith and not for delay.

W. A. SEIFERT,
GEO. ROSS HULL,
ROY J. KEEFER,
Counsel for Appellants.

March 28, 1945.